

15-3014

No. 15,268

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CHIN BICK WAH,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANT'S OPENING BRIEF.

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FILED

FEB 15 1957

PAUL P. O'BRIEN, CLERK



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**JURISDICTIONAL STATEMENT.**

This is an appeal from a judgment of conviction by the Southern Division of the United States District Court for the Northern District of California.

The offense charged in the Indictment are violations of 18 U.S.C. paragraph 371, Conspiracy, and 18 U.S.C. paragraph 1546. The conspiracy charges violations of other Federal Statutes, to wit, 8 U.S.C. 1324; 18 U.S.C. 1542. This Court has jurisdiction under the provisions of 28 U.S.C. 225, Subdivisions (a) and (d).

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**INDICTMENT, PLEA AND SENTENCE.**

The appellant was indicted, together with two co-defendants and six co-conspirators who were not named as co-defendants, in an indictment containing

six counts. She was named only in the First and Sixth Counts.

In the First Count she was charged, with the above-named persons and with other unknown persons, with a conspiracy (18 U.S.C. §371) to commit various crimes concerning the immigration laws and to defraud the United States concerning its right to administer the immigration laws.

In the Sixth Count she was charged with a violation of 18 U.S.C. §1546 in that she made false statements in an application for immigration visa and alien registration knowing them to be false.

During the trial one of her co-defendants, William Fong, changed his plea to one of guilty and the other, Robert Leonard Levy, was granted a Judgment of Acquittal Notwithstanding the Verdict after the jury disagreed as to him.

The appellant's Motions For a New Trial and for a Judgment of Acquittal Notwithstanding the Verdict were denied and she was sentenced to a term of imprisonment for one year on each count, to run concurrently.

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### **STATEMENT OF THE CASE.**

The evidence, as in all involved conspiracy cases, is tortuous, coming as it must, piecemeal from the mouths of many witnesses. We will not therefore, in this Statement Of The Case, attempt to paint a panoramic picture but will summarize, to the best of our ability, the testimony of each witness as it

relates to the appellant. The sum of these independent accounts tells the story.

We have been sincere in our effort to present all of the evidence which we believe bears upon the appellant's case. Although much evidence has been omitted and, in many cases the entire testimony of some witnesses has been eliminated, we believe that the evidence which has been excluded is not pertinent to the appellant's case but applies, rather, to the case of her co-defendants.

Jonathan K. Yee, named as a co-conspirator but not as a co-defendant, testified that this was not his true name and that he was not the son of the father under whose status he had entered this country. He admitted, in fact, that he was in this country illegally, and that he was a cousin of the defendant Fong Wy Sum (also known as William or "Bill" Fong) and that the latter and the latter's mother, co-conspirator Yee Shee, brought him to this country in 1939 by the use of a false "paper" or document which purported to identify him as a son of a citizen of the United States.

He testified that from the time of his arrival in this country until his enlistment in the Army in 1944 he worked at various jobs and for part of this period he was employed by William Fong. He stated that after his discharge from the Army he worked for Fong from 1946 to 1950.

He stated that commencing in 1949 he had conversations with William Fong concerning the possibility of the latter bringing a woman into this country.



This woman was the appellant, Chin Bick Wah. He said that Fong told him he had tried to secure her entry to this country as a student nurse and, again, as the daughter of a citizen but that he had failed in each of these endeavors.

He asserted that in the latter part of 1950 Fong first suggested the plan that Yee should divorce his wife, co-conspirator Jean Jow Yee, go to Hong Kong and marry the appellant and bring her to this country for the benefit of Fong. As part of this plan Fong would pay all the expenses of Yee's trip.

He claimed that at first he demurred and said that he would have to talk to his wife. He did so and at first his wife also refused to become a party to the scheme. However, after much discussion they eventually agreed to Fong's plan. He claimed that one of his reasons for doing so was to enable him to visit his mother who was ill and living in China.

Yee then narrated that in furtherance of the plan he secured a divorce in Reno in 1951, the cost and expenses of which were paid by Fong.

He maintained that after the divorce and until the time he left for Hong Kong he continued to live with his wife, Jean, in San Francisco.

He stated that Fong prepared the passport application for him to sign and paid for his plane ticket to Hong Kong. Also that Fong prepared the visa petition for the appellant which he, Yee, signed.

He declared that he left for Hong Kong in the latter part of October, 1951, and that a group composed



of his wife and daughter, Fong, Yee Shee, and several other people "saw him off" at the San Francisco Airport.

His testimony concerning his arrival in Hong Kong and his subsequent marriage to the appellant is as follows:

"Q. When you got to Hong Kong, did you meet Chin Bick Wah?

A. Yes; she came to the airport and met me at the airport.

Q. Had you ever met her or seen her before in your life in person?

A. No, sir.

Q. Had you ever written a letter to her?

A. No, sir.

Q. At any time in your life prior to that?

A. No, sir.

Q. When you first got to Hong Kong, when she met you at the airport, did you have a conversation with Chin Bick Wah regarding your trip to Hong Kong? [65].

\* \* \*

Q. (By Mr. Schnake): Mr. Yee, just tell us what she said that made you assume the statement you just last made.

A. Well, she just say hello, something in Chinese to me, and I say a few words. I can't remember exactly what she said.

The Court: How did you know who she was?

The witness: Mr. Fong send me the picture of Chin Bick Wah, and then she also got a picture of me, Mr. Fong sent it to her.

Q. (By Mr. Schnake): Did she show you that picture in Hong Kong?

A. Yes.

Q. Did you go with her to the Registry of Marriages in Hong Kong?

A. Not right away.

Q. At a later time?

A. Yes.

Q. Now, prior to your— first of all, did you marry her, or did you go with her to the registry of marriages and sign a [66] certificate in Hong Kong?

A. Yes, sir.

Q. And was that on or about November 29th, 1951?

A. Yes, sir.”

(T. 79-80.)

He further alleged that while he was in Hong Kong he sent a cablegram to Fong asking for his divorce papers and for money. That after he had sent the cablegram he had a conversation with the appellant about money and that she said “we need money for living expenses”. (T. 83.) He claimed that a few days later the appellant told him she had received money from Fong.

He further asserted that about this time he made a telephone call from Hong Kong to William Fong and that the appellant was present while he was making the call. He stated the conversation was partly in English and partly in Chinese. The gist of this conversation was that “I am not going through with it”. (T. 84.) He claimed that he talked about this conversation with the appellant afterwards.

He claimed that he did not “move in” with the appellant after the marriage ceremony. (T. 87.)

He stated that he returned to the United States in February of 1952 and resumed living with his divorced wife, Jean Yee.

He said that when the appellant arrived in San Francisco he met her at the airport and that he was accompanied by Jean Yee and his daughter and that there were several other friends and relatives there. After this reception they all had dinner together in Chinatown.

Later the appellant, accompanied by two relatives, drove to a hotel in Oakland and he followed in his car, accompanied by Jean Yee and his daughter.

At the hotel he signed the hotel register "Mr. and Mrs. Jonathan Yee". He said "Mr. Fong tell (sic) me to do so." (T. 89.)

He claimed he returned to San Francisco with his divorced wife, Jean Yee, and their daughter and went to the apartment on Powell Street where they had resided prior to their divorce.

In response to a question put to him by the Court, he admitted that, while in Hong Kong he lived with the appellant, saying "Under the same roof, but not in the same bed." (T. 91.)

He related a conversation he had with the appellant in the hotel in Oakland as follows:

"Let's take the conversation with Chin Bick Wah here in the United States about William Fong.

A. It was at the hotel in Oakland where she lived.

Q. Had you stopped by to see her?

A. Yes, sir.

Q. Who else was present, if you know?

A. I know Chin Bick Wah's aunt and uncle were there.

Q. They were there?

A. Yes, sir.

Q. What did Chin Bick Wah say, if anything, about William Fong?

\* \* \*

A. She said she wouldn't marry William Fong, she says she wouldn't do it.

Q. (By Mr. Schnake): She would not do it?

A. Yes, sir.

Q. Can you tell me anything else she said in that conversation about William Fong, or about any dealings with him?

A. Yes, sir; she didn't remark about William Fong, she don't like him, or don't like the way he looks, things like that.

Q. Did she describe just what it was she didn't like about his looks?

A. She says—I can't tell you, she mention, she talked to me in Chinese. The best way I can describe it, the way he looks, she don't like the way he looks, things like that.

Q. Can you tell me what, if anything, was said about going through with any deals?

A. Well, I don't remember, sir."

(T. 92-93.)

He also detailed several conversations he had with William Fong during this period (dating from the appellant's arrival in this country until they went

to Seattle as will be later related) one of which was as follows:

Q. All right. Now, a few weeks after this first conversation with Chin Bick Wah, did you have a conversation with William Fong in his car?

A. Yes, sir.

Q. Where was the car?

A. The car parked right in front of Mr. Fong's milk store. [81]

Q. In front of his milk store?

A. Yes, sir.

Q. Was anyone else present at that conversation?

A. No, sir.

Q. Can you tell me what was said?

A. Well, at the time Mr. Fong he think I was hanging onto her.

Q. Now, did he say that, or are you just—

A. No; Mr. Fong actually say that.

Q. What else did he say?

A. Well, he wants me to—I mean, call it quits, something like that. We discussed partly in Chinese and partly in English, and then he wants me to lay off, or something, so I am in—so he and Chin Bick Wah can get together.

Q. What did you say, if anything, in reply to that?

A. I said if she don't like to marry you, nothing else I can do; I make the remark I might marry her myself."

(T. 93-94.)

He then admitted that he had never discussed Fong's statements or reactions with the appellant.



“Q. (By Mr. Schnake): Now, about this time, in the period from March of 1952 till May, 1952, did you have a conversation with Chin Bick Wah regarding anything that Fong had said or done?

A. No; I can't remember, sir.”

(T. 96.)

He then related how he and the appellant travelled to Reno, Nevada, where they went through a marriage ceremony on May 31, 1952.

In this connection, he related the following conversation with the appellant:

“Q. You can't recall. All right. Now, in the last part of May did you have a conversation with Chin Bick Wah regarding going to Reno?

A. Yes, sir.

Q. Where did that conversation take place?

A. It is over in Oakland where she lived.

Q. Who else was present, if anyone?

A. Just Chin Bick Wah and myself.

Q. What did she say regarding that subject?

\* \* \*

A. She said she wants to go up to Reno and get married to make it more permanent so in case anything happen, well, most permanent, more sure so she can stay here.

Q. More secure, is that what you said?

A. More secure.

Q. That she could stay here?

A. Yes.

Q. What else did she say, if anything, about why she wanted to go to Reno?

A. Just what she said, she wanted to get married, you know, and be sure, I mean, everything is okay so she can stay in the United States.

Q. In the United States. All right. Did you go to Reno with her on May 31, 1952?

A. Yes, sir.

Q. Did you go through a ceremony of marriage with her?

A. Yes, sir."

(Tr. 96-97.)

He admitted that from the time of his return from Hong Kong up to August of 1952 he was having domestic difficulties with his divorced wife Jean Yee. As he succinctly described their domestic life "We had a fight all the time, sir". (T. 97.)

He then related how in August 1952 he travelled by automobile with the appellant to Seattle, Washington, accompanied by his young daughter and infant son, who had been born to his divorced wife Jean Yee the day after his marriage to the appellant in Reno.

He admitted that he lived with the appellant as man and wife while in Seattle (T. 98). They remained there a week, purchased household furnishings and rented an apartment. He said that he had a very difficult time with the appellant and decided to call Jean Yee to come up and bring them back to San Francisco.

He telephoned Jean Yee, who came to Seattle and they all drove back to San Francisco by automobile.

William Fong came to the apartment and they all had a conversation after which the appellant left with Fong and her aunt. (T. 101.)



He claimed that since his return from Seattle he had lived with his estranged wife, Jean Yee and that they remarried in 1955.

He testified that several weeks after he returned from Seattle he had a conversation with Yee Shee as follows:

“Q. (By Mr. Schnake): I believe yesterday, Mr. Yee, you stated the time and place and persons present of a conversation with Yee Shee several weeks after you returned from Seattle, which conversation was held at her apartment, is that correct?

A. Yes, sir.

Q. Now, would you state what Yee Shee said and what you said?

A. She called me up, Yee Shee called me up. I went up to her apartment. She asked me to go ahead and get a divorce and get it over with so Chin Bick Wah can marry Mr. Fong.

Q. What did you say?

A. So I told her, said I will not do it on account of Mr. Fong keeping me, pushing me around and giving me a raw deal, or something like that.”

(T. 107.)

On cross-examination he stated at the time he signed the hotel register in the hotel in Oakland “I think Mr. Fong was there too. It was Mr. Fong’s idea.” (T. 128.)

He testified that it took several days to make the trip to Seattle . . . “more than two or three days” (T. 130) and that at each of the motels at which they stopped he and the appellant lived together (T. 131), and that they lived together for several days at a hotel

in Seattle and then rented a two-room apartment (T. 132-133).

He also admitted that while the appellant was living in the hotel in Oakland he changed his address with the Anglo-California Bank to that address (T. 135) and also that he gave the appellant a check for \$90.00 in 1952 (T. 136 and T. 151).

He also admitted that before he went to Hong Kong he and Jean Yee were having domestic difficulties (T. 139) and that on at least one occasion they had a quarrel concerning another woman named Lucille (T. 141).

The Government introduced a statement given by the appellant to the Immigration and Naturalization Service in which she stated in part:

“Q. To whom were you first married?

A. The first time I was married in Hong Kong in November or December, 1951, to Yee Ngoon Foon, also known as Johny Foon Yee. My second marriage was in San Francisco to William Fong on October 1, 1953.

Q. How was the first marriage terminated?

A. The first one was terminated by [191] divorce.

Q. On what date?

A. It was on July 18 or August 18, 1953, that I was divorced.

Q. Where did that divorce action take place?

A. Reno, Nevada.”

(T. 189.)

She also stated that she first became acquainted with William Fong in San Francisco. (T. 189.)

In connection with William Fong's divorce she

“Q. Did you and William Fong have one or more talks about his divorcing his first wife prior to the time that he was divorced during October of 1952?

A. No.

Q. Did you have anything to do with William Fong's divorcing his first wife?

A. No, I wasn't aware and I did not interfere in that marriage.

Q. Did you and Gee King Yip, first wife of William Fong, have an argument during the latter part of 1952 that caused the divorce of William Fong and his wife?

A. No.

Q. Isn't it true that you do know that [194] William Fong was previously married to this woman and that he was divorced from her shortly prior to the time that you and he were married?

A. I wasn't very clear about that''.

(T. 191.)

and again:

“Q. Are you quite certain that you do not know whether William Fong was married prior to the time you became married to him?

A. I didn't ask him about that, nor was I particularly attentive to that question.”

(T. 193.)

William Moore, an Agent of the Immigration and Naturalization Service testified that he questioned the defendant William Fong and that among other things he testified as follows:

“And we asked him about Chin Bick Wah, and he said ‘Yes, that is my wife, now; after Jona-

than brought her over here, I fell in love with her and married her.' [260]

Q. Did he say when he had started courting her?

A. Well, we asked him that specifically, and he stated that he started courting her after Jonathan Yee and Chin Bick Wah had been divorced."

(T. 252.)

and again:

"We asked Mr. Fong if he had recommended Jonathan Yee to Mr. Levy or had directed him to Mr. Levy for the divorce action between Jonathan Yee and Jean Jow Yee, and Mr. Fong replied that he had.

When we asked about Chin Bick Wah, Mr. Fong told us that he had been writing letters to Chin Bick Wah for some time, that a friend of his had been in China and upon his return had shown him a picture of Chin Bick Wah and stated that this was a nice girl, or words to that effect, and that she wanted to come to the United States. Mr. Fong stated that he had written letters to Chin Bick Wah and had exchanged letters with her.

Also, that Chin Bick Wah had sent a picture to him, a later picture in a letter.

Then we asked about this trip that Jonathan Yee took to Hong Kong and Mr. Fong stated that he had bought the airplane ticket for Jonathan Yee to make the trip, that is, we asked him outright who paid for the airplane ticket, and Mr. Fong said, 'I did.'

Then we asked him about expense money for the trip and he said, 'Well, I gave Jonathan Yee

\$200.00 that was in the nature of an advance against his salary; he had been working for me and he was a true and faithful employee and he told me he wanted a couple of months off to make a trip to Hong Kong.'

We asked Mr. Fong at that time if he knew that Jonathan Yee intended to go to Hong Kong to marry Chin Bick Wah, and he said no, he didn't, he just thought he wanted to make a trip and that—well, several times we referred to this money for the ticket and the advance of \$200.00, which would have been about \$1500.00, and asked Mr. Fong if he had any proof that he had loaned the money to the man, a note or an I.O.U. anything like that. He said no, he was an old employee and it's just Chinese custom not to get a receipt or a note or promissory note in the case of that kind, 'I just loaned him the money.'

And he further stated that Mr. Yee hadn't paid back the money."

(T. 253-254.)

Gee King Yip, the first wife of William Fong testified that a few days after the appellant's arrival in the United States she had a conversation with her in which the appellant allegedly said:

"A. Chin Bick Wah asked me to divorce Fong Wy Sum, otherwise she says she will not marry him."

(T. 337-338.)

and also:

"Q. (By Mr. Schnake): Was there anything said in this conversation about the use of the name, Fong Shee?



A. After I divorce Fong Wy Sum I could not use the name Fong Shee.

Mr. Schnake: Are you asking the witness to repeat part of the answer?

A. (Continuing): Even my daughter have to be away from the Fong family."

(T. 338.)

Jean Jow Yee, the first wife of Jonathan Yee, whom he divorced before going to Hong Kong where he married the appellant, corroborated his testimony to the effect that she and her husband conspired with William Fong to have her husband secure a divorce and go to Hong Kong to marry the appellant and bring her back for Fong.

She said that Fong's intention was to bring the appellant out but "not really marry her" (T. 371).

She said that Jonathan telephoned her from Hong Kong and said for her to tell Fong that "he was not going through with it and that he needed money for expenses" (T. 402).

She corroborated Jonathan Yee's testimony concerning the episode when they met the appellant at the airport and said that Jonathan Yee introduced William Fong to the appellant at that time (T. 407).

She related a conversation with the appellant in which the latter allegedly told her how "grateful she was I stepped aside to give her a chance to come over to the United States" (T. 415) and two other conversations to the same effect (T. 416 and T. 419).

She related how she flew to Seattle and returned Jonathan Yee, her two children and the appellant to

San Francisco by automobile and that when they arrived at her apartment the appellant attempted to get Yee to remain with her (T. 436) but that she was finally persuaded to return to the hotel in Oakland (T. 439).

This, in our opinion constitutes a fair summary of the evidence as it applies to the appellant.

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#### **STATEMENT OF POINTS RELIED ON.**

The appellant contends:

1. The evidence was insufficient to support either the verdict or the judgment and sentence of the Court.

2. The Government failed to prove an essential element of the offense charged by failing to prove the invalidity of the marriage of the appellant in Hong Kong.

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#### **ARGUMENT.**

There is no doubt that a conspiracy was proved at the trial, but that is not the question which concerns us. The riddle which is inherent in this case is the identity of the persons comprising the conspiracy and whether or not it was proved, to a moral certainty and beyond a reasonable doubt, that the appellant was a party to it. It would see that two of the most culpable members of the conspiracy, Jonathan and Jean Yee, who blandly admitted their par-



ticipation from the witness stand and whose criminal activities were compounded by perjury and subornation of perjury, were not prosecuted. Yet, the appellant was prosecuted, although her connection with the scheme, if any there be, is most tenuous.

It is obvious that if the appellant was a party to the conspiracy, she was either a member of it from its inception, that is, she was aware of the entire scheme before her marriage to Jonathan Yee in Hong Kong or, positing innocence of the plan before her marriage, she willingly joined in the conspiracy, if it existed at that time, after her arrival in the United States and acted in furtherance of its designs.

Now let us examine the evidence as to the first proposition. There is absolutely no evidence in the testimony of Jonathan Yee that the appellant was even aware of the conspiracy or plan before she arrived in the United States. Certainly he testified to no statements which he made to the appellant or she to him which indicated any knowledge on her part. As a matter of fact, as we shall see, the testimony and the inferences to be drawn therefrom are quite to the contrary.

Likewise, Jonathan Yee's testimony is silent as to any statement made by any co-conspirator (assuming that such evidence would have been admissible against the appellant) which indicated any communication of the scheme by that person to the appellant or any admission on her part that she was aware of the plan.

We might interject at this point, who would be more likely to know of the appellant's participation

than her husband, Jonathan Yee? In fact, it is beyond comprehension, considering the physical factors involved—such as the fact that one group was in the United States and the appellant was in China and that none of them had met the appellant until Yee met her in Hong Kong, how any conspiracy between them could have come into being without some discussion concerning it after they had met for the first time. Yet the record is strangely and significantly silent.

Yee testified at great length and with precise particularity to numerous conversations with William Fong, Jean Yee and other persons in which the scheme was planned and its details agreed upon, yet never is it mentioned that the appellant—the alleged arch-conspirator and the person around whom the whole scheme revolves—is even aware that the conspiracy has come into existence.

Never once does Fong explain that he has communicated the details of the plan nor the part which she is to play to the appellant. Nor does Yee do so when they meet for the first time.

This seems like strange planning upon the part of a group of conspirators, especially when the scheme calls for the meeting of two strangers in a foreign country and, of all things their marriage. Despite this the “errand boy” never once alludes to any arrangements having been made with the “bride”, never asks what he shall say to her on their meeting and carries no message from the “master-mind” of the plot, William Fong.

The absurdity of this is made blatantly apparent in his description of their first meeting when he alights from the plane in Hong Kong. This "messenger-boy" whose only duty in the well-laid scheme is to go through a fake ceremony of marriage with the appellant for the sole purpose of bringing her to this country for Fong, deplanes at the airport, meets this woman who is a total stranger to him and she says "Hello" and he says a few words and he "can't remember exactly what she said." (T. 80.)

Nevertheless, without further ado, and apparently without further discussion, they are married and they "live under the same roof but not in the same bed." (T. 91.)

None of his activities while in Hong Kong fits in with the existence of a conspiracy of which the appellant is a party. He relates, for example, how *he* sent a cablegram to Fong requesting money and *after* he sent it he and the appellant had a conversation at which the appellant stated they needed money for living expenses, and later states that she received money from Fong (T. 81-83). If the appellant was a member of the conspiracy at that time would not the conversation about getting money from Fong take place *before* the cablegram was sent?

The telephone conversation which allegedly took place between Yee and Fong at which the appellant was supposed to be present proves nothing one way or the other as to the participation by the appellant in a conspiracy. The gist of the conversation appar-

ently was that he was not going to marry the appellant (T. 84-85). Nevertheless, he did.

It seems very significant to us that, at this point, there is no testimony that the appellant participated in the conversation with Fong which would have been most logical if all three were parties to the conspiracy at that time and if it appeared that the success of the conspiracy, and the accomplishment of its very purpose were drastically threatened.

We respectfully submit that up to this point there is no evidence offered by Jonathan Yee to prove that the appellant was a party to any conspiracy.

Now let us examine Yee's testimony as to the events which transpired after the appellant's arrival in this country to discover if any of her actions or statements constituted an admission of her participation prior to her marriage in Hong Kong or if any of the co-conspirators, remarks or actions (which might be binding on the appellant) implicate her in the conspiracy before that time.

Despite Yee's contention that he did not live with the appellant in the hotel in Oakland—despite the fact that he changed his address with his bank to that location and gave the appellant a check while she lived there—we find him engaging in several curious conversations with her—and with others—curious, that is, for a member of a conspiracy whose only part in that conspiracy was to bring the appellant to this country for Fong and all the more curious and difficult to understand if the appellant was a knowing member of the conspiracy.



We find them, for example, having a conversation in which the appellant says she doesn't like Fong's looks (T. 93). This is hardly the remark of a woman who, months before, had conspired with Fong to marry him. And what is more curious, this untimely remark elicits no comment from Yee. In fact, when he is asked if as part of this conversation "anything was said about going through with any deals" he answers, "Well, I don't remember, sir." (T. 93.)

Then we find Yee having a very significant conversation with William Fong in which he says, "... if she don't like to marry you, nothing else I can do; I made the remark I might marry her myself." (T. 94.) Again, hardly a reasonable remark for the "errand boy" to make to the "master-mind" concerning the "pawn" if the "pawn" had been a party to the scheme from its inception.

Furthermore, despite the government's allegation that the appellant was a part of the conspiracy from the beginning and had evidently arranged with Fong to be brought to this country by Yee before he ever went to Hong Kong, and despite the obvious fact that the plan was not working out after her arrival, Yee from the time of the appellant's arrival in this country until their marriage again in Reno says that he never had a conversation with her regarding anything that Fong had said or done (T. 96). Is it conceivable that Yee and the appellant during all of this time and when they are contemplating a remarriage in Reno never find it necessary to discuss the fact that the very purpose of the alleged con-

spiracy is not being carried out and on the contrary, far from the appellant marrying Fong she is actually marrying Yee for the second time?

Again, we find that it is the appellant who wants to marry in Reno and whom does she want to marry, Fong, with whom she allegedly conspired? No, indeed. She wants to marry Yee for a second time to make it "more secure". (T. 96.) How does this action further the alleged conspiracy upon the part of the appellant? Is this the action of a woman who had conspired with Fong to go through a sham marriage with Yee so that she could come to this country to marry—not Yee, but Fong?

How, again does the travelling to Seattle with Yee and his two infant children for the purpose of setting up a permanent home, a trip on which Yee admits the marriage was consummated, even if it had not been before, tie in with the appellant being aware of the conspiracy? (T. 98.) And is this action upon the part of Yee the action of a man who has gone through a "sham divorce" from Jean Yee and two "sham marriages" with the appellant in order to bring to fruition a conspiracy the only purpose of which was to bring the appellant to this country to marry Fong?

Finally, what affirmative action, if any, does the appellant take to escape Yee—so that she can accomplish the object of the conspiracy and go with Fong? The answer is none. On the contrary, she tries to stay with Yee as his wife, she tries to tie

herself to him, even to the extent of marrying him a second time.

It is Yee who telephones Jean Yee and causes them to return from Seattle. Upon their return the appellant wants him (Yee) "to take her back" (T. 101). Yee, despite his alleged "sham divorce" from Jean Yee and despite his insistence that during all of this time he is living with her does not see fit to marry her until 1955 (T. 102). Is this the action of a mere "errand boy" who divorced his wife merely to become a party to a conspiracy the actual purpose of which was accomplished with the arrival of the appellant in this country in the early part of 1952?

The purpose of the conspiracy was accomplished and the conspiracy terminated with the arrival of the appellant in this country. There may have been a subsidiary agreement between some of the co-conspirators that they would lie to the Immigration authorities if questioned but there is no evidence that the appellant was a party to this agreement.

Therefore, in our scrutiny of the statements and actions of the appellant after she arrived in this country we are concerned only if they show a knowledge of, and a participation in, the conspiracy, before her marriage in Hong Kong or if they merely show the natural reaction of a woman who learns for the first time after her arrival in this country that her husband had some "deal" with Fong.

We respectfully submit that all of the evidence concerning her activities after her arrival here points



to the fact that she was not a member of the conspiracy, that she believed she was validly married to Yee in Hong Kong and that she did everything in her power to stay married to him.

How else do we explain her second marriage to Yee in Reno if not on the basis that when she learns the marriage in Hong Kong is questionable because of the activities of her husband and Fong she wants to make her marriage more secure? If she was a party to the conspiracy she would have known and accepted the idea from the beginning that her status would stand or fall on her marriage in Hong Kong.

How else do we explain her moving several months later, to set up a home with her husband and his children in Seattle and the admitted consummation of the marriage?

Viewed in this light, nothing which the appellant says or does after her arrival in this country indicates her participation in the conspiracy but, on the contrary, shows her desperately trying to maintain her status as Mrs. Yee.

The appellant's alleged conversation with Gee King Yip is inherently unreasonable and unintelligible. In one breath she says the appellant asked her to divorce Fong and in the next breath she says the appellant told her that if she *did* divorce him she couldn't use the name, "Fong" and that "even my (her) daughter would have to be away from the Fong family" (T. 337-338).

The only logical inference that can be drawn from the full tenor of this conversation is that the witness

should *not* divorce Fong so that Fong could not prevail upon Jonathan Yee to leave the appellant.

There is nothing inconsistent with this theory in the testimony of Jean Jow Yee. All of the appellant's conversations with her took place after she arrived in this country and when she was confronted for the first time with the situation that, because of the prior agreement between Yee and Fong, of which she knew nothing, Fong was trying to prevail upon Yee to carry out his end of the bargain and give her up.

Nor is there anything in the testimony to show that, granting her ignorance of the conspiracy before her marriage in Hong Kong, she willingly joined in it after her arrival in this country. She certainly did nothing to further the conspiracy after she got here. In fact, it would seem that she did everything in her power to defeat its success. If the evidence in this case proves anything it proves that the appellant did everything possible to stay married to Yee until he "threw her out" and decided to return to his former wife.

It is fundamental that there must be evidence of actual participation, rather than mere cognizance, acquiescence or approval of an unlawful act to sustain a conviction for conspiracy.

*Stack v. United States*, 27 F. 2d 16;

*Jianole v. United States*, 299 F. 496;

*Lucadamo v. United States*, 280 F. 653.

The evidence offered by the Government as against the appellant, which is all by inference and innuendo, is insufficient as a matter of law to sustain her con-

viction. This is particularly true in the face of her testimony (offered by the Government) through her statement given to the Immigration authorities, that she was first married to Jonathan Yee in Hong Kong in 1951, that she first became acquainted with William Fong in San Francisco and that she had no prior arrangement by letter or otherwise with Fong or anyone else to come to this country to be Fong's wife (T. 188-193).

The one essential element in this case is: Was the appellant validly married to Jonathan Yee in Hong Kong? If she was she cannot be guilty of a conspiracy to defraud the United States in the enforcement of its immigration laws by entering into a spurious marriage with Yee for the purpose of coming into this country.

It is a fundamental rule of conflict of laws that a marriage valid where celebrated is valid everywhere unless it is incestuous, polygamous, or otherwise declared void by statute.

*Loughran v. Loughran*, 292 U. S. 216, 79 L. ed. 1219, 54 S. Ct. 684;

*Restatement, Conflict of Laws* §§121, 132-134.

Therefore, in order to establish a case, it was incumbent upon the government to prove that the marriage between the appellant and Jonathan Yee in Hong Kong was invalid because, if it was not, the appellant obviously could not have conspired to defraud the United States in the enforcement of its immigration laws because she was legally entitled to enter this country as the spouse of Yee. In passing

we might comment that, as it subsequently developed, the appellant might have been administratively deportable because it was developed that Yee, himself, was not a citizen, but this would not make her guilty of any criminal act and certainly not of the charges contained in this indictment. The Government does not contend, nor did it prove, that the appellant was aware that Jonathan Yee was not a citizen at the time of their marriage.

It is true that evidence was introduced, erroneously as we believe, that Jonathan Yee did not intend to enter into a valid marriage when he submitted to the ceremony in Hong Kong. (T. 175.) But that need not concern us here. If the appellant in good faith intended to enter into the relationship of husband and wife at that time she was, for the purpose of this case, married.

The validity or invalidity of that marriage because of lack of mutual consent, might or might not be subject to a direct attack by way of an annulment proceeding or some other appropriate action between the parties, but the Government cannot attack the marriage in order to establish a criminal intent upon the part of the innocent party.

*Schibi v. Schibi*, 136 Conn. 196, 69 A. 2d 831, 14 A.L.R. 2d 620;

*Hanson v. Hanson*, 287 Mass. 154, 191 N.E. 673, 93 A.L.R. 701;

*Norman v. State*, 127 Tenn. 340, 155 S.W. 135, 45 L.R.A. N.S. 399;

*State v. Frey*, 76 Minn. 526, 79 N.W. 518, 77 Am. St. Rep. 660.



The facts in the instant case clearly distinguish it from the factual situations—and consequently, from the rulings—in *United States v. Rubenstein*, 151 F. 2d 915 and *Lutwak v. United States*, 344 U.S. 604, 97 L. ed. 593 73 S. Ct. 481.

In the *Rubenstein* case a third party, an attorney, was prosecuted for his part in procuring the illegal entry of an alien through an invalid marriage. The invalidity and fraudulent nature of the marriage were never in doubt. In fact the two parties to the ceremony testified that they did not intend to marry, that they did not intend to consummate the marriage and agreed that they would get a divorce in six months.

The court quite properly held

“... if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have not really agreed to be married at all.” *United States v. Rubenstein*, *supra*, at page 919.

Similarly in the *Lutwak* case, *supra*. After discussing the evidence the Court said:

“There is an abundance of evidence in this record of a conspiracy to contract spurious, phony marriages for the purpose of deceiving the immigration authorities and thereby perpetrating a fraud upon the United States and of a conspiracy to commit other offense against the United States” pp. 609-610.

Based upon these facts the Court held that the validity of the marriages was not material saying at

page 611 "We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. *In the circumstances of this case*, the ceremonies were only a step in the fraudulent scheme and actions taken by the parties to the conspiracy." (Emphasis supplied.)

Later in the same opinion the Court makes clear the distinction which is involved between that case and the instant case when it says at page 613 "In the instant case, as in the Rubenstein case, there was no good faith—no intention to marry and consummate the marriages even for a day. With the legal consequences of such ceremonies under other circumstances, either in the United States or France, we are not concerned."

Mr. Justice Jackson's dissenting opinion in the *Lutwak* case, *supra*, in which Mr. Justice Black and Mr. Justice Frankfurter joined, clearly states the law which should be followed even where, as in that case, there was overwhelming evidence of the invalidity of the marriages.

The Court said at pp. 620-621:

"... We are not convinced that any crime has been proved, even on the assumption that all evidence in the record was admissible. These marriages were formally contracted in France, and there is no contention that they were forbidden or illegal there for any reason. It is admitted that some judicial procedure is necessary if the parties wish to be relieved of their obligations. Whether by reason of the reservations with

which the parties entered into the marriages they could be annulled may be a nice question of French law, in view of the fact that no one of them deceived the other. We should expect it to be an even nicer question whether a third party, such as the state in a criminal process, could simply ignore the ceremony and its consequences, as the Government does here.

We start with marriages that either are valid or at least have not been proved to be invalid in their inception. The Court brushes this question aside as immaterial, but we think it goes to the very existence of an offense. If the parties are validly married, even though the marriage is a sordid one, we should suppose that would end the case. On the other hand, if the marriage ceremonies were for some reason utterly void and held for naught, as if they never had happened, the Government could well claim that entry into the United States as married persons was fraud. But between these two extremes is the more likely case—marriages that are not void but perhaps voidable. In one of these cases, the parties (on the trial) expressed their desire to stay married, and they were acquitted; and no one contends that their marriage is void. Certainly if these marriages were merely voidable and had not been adjudged void at the time of the entry into this country, it was not a fraud to represent them as subsisting. We should think that the parties to them might have been prosecuted with as much reason if they had represented themselves to be single. Marriages of convenience are not uncommon and it cannot be that we would hold it a fraud for one who has contracted a marriage not forbidden by law to represent himself as



wedded, even if there were grounds for annulment or divorce and proceedings to that end were contemplated.”

As the Court said, if the parties are validly married that should end the case. That is what we have in this case. The Government did not—and could not—prove that the appellant and Jonathan Yee were not married. Every essential element of a valid marriage was present. The ceremony, the holding out as man and wife, the consummation of the marriage. What more is required?

If the appellant was validly married then she was entitled to come in as the spouse of her husband and it would be impossible for her to commit the conspiracy charged.

It follows also that if the appellant was married and if she was not a party to the conspiracy, the evidence was clearly insufficient to support the verdict on the Sixth Count of the indictment.

It is alleged that she made false statements in that she represented that she was married to Jonathan Yee, that her passage to the United States was paid for by her husband Jonathan Yee and that she intended to join her husband in the United States.

Two of these allegations fall of their own weight because she *was* married to Jonathan Yee and nothing could be more obvious than that she intended to, and did, join him in the United States.

As to the third allegation, that her passage to the United States was paid for by her husband Jonathan

Yee, we respectfully submit that this record fails to disclose a scintilla of evidence to the effect that her passage was *not* paid for by Jonathan Yee and certainly no evidence that, if it was not, that she was aware of that fact.

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### CONCLUSION.

For the reasons stated, we respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,  
February 12, 1957.

Respectfully submitted,

JAMES T. DAVIS,

*Attorney for Appellant.*